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IN THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN, STATE OF MICHIGAN

No. 6352

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

HAROLD ANDERSON,
Respondent-Appellant.

STATEMENT AS TO JURISDICTION

Pursuant to Rule 12, paragraph 1 of the Revised Rules of the Supreme Court of the United States, as amended, appellant, Harold Anderson, respectfully presents his statement of the basis of the jurisdiction of the Supreme Court of the United States upon appeal to review the sentence of the Circuit Court for the County of Berrien, Michigan upon a finding of the said court that appellant was guilty of a violation of Section 352 of the Michigan Penal Code, Michigan Statutes Annotated 28.584.

A. Statutory Provision Believed to Sustain Jurisdiction

The statute believed to sustain appellate jurisdiction is Section 1257 of Title 28 of the United States Code which provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • • • • • •

"(2) By appeal, where there is drawn in question the validity of a statute of any state on the ground of its being

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repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity."

B. Statute of the State of Michigan, the Validity of Which Is Involved

The statute of the State of Michigan, the validity of which is involved in this appeal, is Section 352 of the Michigan Penal Code, (Act No. 328 of Public Acts of 1931, reenacting Section 8612, Michigan Compiled Laws, 1929, Michigan Statutes Annotated Section 28.584) which provides as follows:

"Any person or persons who shall by threat, intimidation or otherwise, and without authority of law, interfere with, or in any way molest, or attempt to interfere with, or in any way molest or disturb, without such authority, any mechanic or other laborer in the quiet and peaceable pursuit of his lawful avocation, shall be guilty of a misdemeanor."

C. Dates of Judgment and Application for Appeal

The finding of appellant's guilt and the sentence of the Circuit Court for the County of Berrien, Michigan were made and entered January 16, 1948. A motion for a new trial was duly filed on January 29, 1948 and denied on April 19, 1948.

An order of the Supreme Court of the State of Michigan, denying appellant's application for leave to appeal from the said sentence was made November 12, 1948 and entered on November 15, 1948. Allowance of an appeal in a criminal case is discretionary with the Michigan Supreme Court (Compiled Laws, Michigan, Section 770.3 Michigan Statutes Annotated Section 28.1100; Rule 60 Section 1 of the Rules of the Supreme Court of the State of Michigan).

Under these circumstances, the Circuit Court for the

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County of Berrien was the highest court of the state in which a decision could be had. *Western Union Telegraph Co.* v. *Crovo* 220 U. S. 364, 366; *Norfolk & S. Turnpike Co.* v. *Virginia* 225 U. S. 264, 267-269; *Stratton* v. *Stratton* 329 U. S. 55; *American Express Company* v. *Levee* 263 U. S. 19; *Adam* v. *Saenger* 303 U. S. 59, 61; *Thornhill* v. *Alabama* 310 U. S. 88.

Its sentence was final, since it finally disposed of all the issues in the case. *Department of Banking* v. *Pink* 317 U. S. 264; *Cole* v. *Violette* 319 U. S. 581; *Georgia Railway & Power Co.* v. *Decatur* 262 U. S. 432, 437.

The time for applying for an order allowing appeal to the Supreme Court of the United States, however, was from November 15, 1948, the date of the entry of the order of the Supreme Court of the State of Michigan denying the application for leave to appeal the sentence. *American Express Co.* v. *Levee, supra;* U. S. C. Title 28, Sections 2101(c), 2104; Rule 38½, Revised Rules of the Supreme Court of the United States, as amended; see Rule 58, Federal Rules of Civil Procedure; *Cole* v. *Violette, supra.*

The application for appeal was presented on February 8, 1949 and was allowed on February 8, 1949.

The appeal has been, therefore, presented and allowed within the ninety days required by U. S. C. Title 28, Section 2101(c) and 2104 and Rule 38½ of the Revised Rules of the Supreme Court of the United States, as amended.

D. Nature of the Case

Appellant, an employee of the New Products Corporation of Benton Harbor, Michigan, was the chairman of a unit of Local 931 of the United Electrical, Radio Machine Workers of America—C. I. O., which, on April 22, 1947, had engaged in a strike against that Company (Tr. 13, 259-260). A back-to-work movement among the striking employees began and on August 8, 1947 (Tr. 71-72) appellant was ar-

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rested on the complaint[1] of Leonard J. Gruss, one of the participants in the back-to-work movement, charged with violating Section 352 of the Michigan Penal Code. Appellant was tried and convicted in the Municipal Court of the City of Benton Harbor. On September 15, 1947, he appealed to the Circuit Court for the County of Berrien, where, having waived a trial by jury, he was tried by the Court, found guilty as charged, and sentenced, on January 16, 1948, to be confined to the County Jail for sixty days. The court found that appellant "did take part in bouncing or rocking (complainant's) car, trying to tip it over, and that previous to that by a moment or so (appellant), had told him to back out (See Appendix A, Findings of the Court). His motion for a new trial having been denied on April 19, 1948, after

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[1] The complaint reads as follows:

IN THE MUNICIPAL COURT OF THE CITY OF BENTON HARBOR

"STATE OF MICHIGAN,
County of Berrien,
City of Benton Harbor, ss:

The Complaint and Examination on Oath and in Writing of Leonard J. Gruss taken and made before me, Webster Sterling, Municipal Judge of the City of Benton Harbor, in Berrien County, upon the 8th day of August A. D. 1947, who being duly sworn, says that heretofore, to-wit:

On the 8th day of August A. D. 1947 at the City of Benton Harbor in Berrien County, one Harold Anderson, late of the City of Benton Harbor and in the County of Berrien aforesaid, did refuse to allow Leonard J. Gruss, an employee of the New Products Company, located at 448 North Shore Drive in the City of Benton Harbor, Michigan, to enter the premises of the New Products Company for the purpose of carrying on his lawful avocation and did by threats and intimidations and without authority of law interfere with and did molest and attempt to interfere with and disturb without authority of law the said Leonard J. Gruss, a laborer, in the quiet and peaceable pursuit of his lawful avocation, to-wit: that of an employee of the New Products Company, in violation of Section 352 of the Michigan Penal Code, being Act 326 of the Public Acts for the State of Michigan of 1931, and contrary to the form of the statute in such case made and provided."

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oral argument, he applied for leave to appeal to the Supreme Court of the State of Michigan, on a concise and agreed statement of facts, certified on September 15, 1948 by the Circuit Court as having been duly settled, and as fairly presenting the questions for review. The Findings and Sentence of the Circuit Court and the Opinion of the Circuit Court Denying Motion for New Trial are attached hereto as Appendix A.

E. Rulings of the Court Which Bring the Case Within the Jurisdictional Provision Relied On

In his motion for a new trial in the Circuit Court, appellant contended:

"2. The statute of the State of Michigan under which this Respondent was charged is in contravention of and violates the rights granted to this Respondent by the First Amendment of the Constitution of the United States of America, and of the Fourteenth Amendment of the Constitution of the United States of America, and any prosecution under such statute is illegal and in violation of the guaranteed Federal Rights of this Respondent.

"3. The statute of the State of Michigan under which this Respondent was charged is vague and indeterminate and incapable of construction."

The Circuit Court, in its Opinion denying new trial, held

"2. Respondent here, for the first time, raised the constitutionality of the act under which the respondent was charged. This court is of the opinion that there is no merit in this contention.

"3. Respondent claims that the act in question is vague and indeterminate, and incapable of construction. With

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this contention, the Court is unable to agree. The act is couched in plain unambiguous terms and is vague only to defense counsel who attempts to read into it interpretations obviously not in the contemplation of the legislature when the act was passed."

In his application for leave to appeal to the Supreme Court of the State of Michigan, which the Circuit Court certified as having been duly settled and as fairly presenting the questions for review, appellant stated in his Reasons and Grounds for Appeal:

"10. The statute under which this Respondent was tried is vague and indeterminate and incapable of construction.

"11. The statute under which this Respondent was charged is in contravention of and violates the rights granted to this Respondent by the First Amendment of the Constitution of the United States of America, and of the Fourteenth Amendment of the Constitution of the United States of America, and any prosecution under such statute is illegal and in violation of the guaranteed Federal Rights of this Respondent.

"12. The record is totally devoid of any evidence indicating the existence of a clear and present danger to the community, at the time of the enactment of the statute under which this Respondent was charged, which would have justified the legislature of the State of Michigan in enacting such legislation limiting the rights of pickets in their exercise of their rights of free speech, as was sought to be accomplished by this particular statute.

"13. The record is totally devoid of any evidence indicating the existence of a clear and present danger to the community justifying the application of this statute against this Respondent and curtailing his rights as a picket during a strike, exercising his rights of free speech."

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It is settled that if the state court entertains a motion for a new trial and considers and passes upon the federal question first presented in that motion, the question is made in apt time. *International Steel & Iron Co.* v. *National Surety Co.*, 279 U. S. 657; *Whitfield* v. *Ohio*, 297 U. S. 431; *Nickey* v. *Mississippi*, 292 U. S. 393; *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358.

"The general rule (is) that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing (citing cases) . . . The rule, general as it is, does not extend to cases, where the constitutional question, however tardily raised, is considered and decided" (citing cases) 287 U. S. 366-367.

There was thus drawn into question in the Circuit Court for Berrien County, the highest court of the State of Michigan in which a decision could be had, the validity of Section 352 of the Michigan Penal Code on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity.

F. Substantial Nature of the Questions Involved

The federal questions presented to the Circuit Court for the County of Berrien were the invalidity, on its face, of Section 352 of the Michigan Penal Code, as violative of the free speech guarantee of the First and Fourteenth Amendments and the requirement of specificity under the due process clause of the Fourteenth Amendment.

In sustaining the validity of the statute against these challenges, the Circuit Court decided important federal questions in a way which conflicts with applicable decisions of this Court. *Saia* v. *New York*, 334 U. S. 558; *Winters* v. *New York*, 333 U. S. 507; *Thornhill* v. *Alabama*, 310 U. S. 88; *Thomas* v. *Collins*, 323 U. S. 516; *Herndon* v. *Lowry*, 301

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U. S. 242; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Connally* v. *General Construction Co.*, 269 U. S. 385; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81:

1. As to freedom of speech and assembly guaranteed by the Fourteenth Amendment:

Like the licensing statutes condemned by the Supreme Court in *Lovell* v. *Griffin*, 303 U. S. 444, see *Thornhill* v. *Alabama*, 310 U. S. 95, n. 7; *Saia* v. *New York*, 334 U. S. 558; *Kovacs* v. *Cooper*, — U. S. —, No. 9, October Term, 1948, decided January 31, 1949, dissenting opinion of Mr. Justice Frankfurter, the statute here challenged contains, on its face, a threat of prior restraint upon freedom of discussion. *Thornhill* v. *Alabama*, 310 U. S. 97. The statute broadly punishes not merely interference by threats and intimidations, but interference "otherwise" and "attempts in any way to interfere." As such, it "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure and results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." 310 U. S. 97-98. *Thomas* v. *Collins*, 323 U. S. 516; *National Labor Relations Board* v. *American Tube Bending Co.*, 134 F. 2d 993 cert. den. 320 U. S. 768.

The statute in question must be judged on its face, without regard to its application to the particular facts of the case at bar. *Thornhill* v. *Alabama*, 310 U. S. 96-97; *Carlson* v. *California*, 310 U. S. 106; *A. F. L.* v. *Swing*, 312 U. S. 321; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Jones* v. *Opelika*, 319 U. S. 103; *Winters* v. *New York*, 333 U. S. 507; *Saia* v. *New York*, 334 U. S. 558. See Note: Inseparability in Application of Statutes Impairing Civil Liberties 61 Harv. L. Rev. 1208 (1948). The charges against petitioner were

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generally in the language of the statute, although they omitted the word "otherwise", but the Circuit Court, in its findings, included "otherwise" as an essential element of the offense. See Appendix A. Where regulations of liberty of discussion is concerned, there are special reasons for observing the rule that it is the statute and not the accusation or the evidence under it which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359.

The construction put upon the statute by prior decisions of the Michigan Supreme Court do not take the case out of the rule. In *People* v. *Bashaw*, 295 Mich. 503, a conviction under this statute was reversed, on the ground that "Peaceful picketing does not come within the purview of the statute under which defendant was prosecuted." But, in that case, all that was involved was a single picket, walking peaceably back and forth, carrying a sign, without speaking to anyone, before a plant which was not on strike. An employee within the building claimed that he was thereby intimidated. The lower court overruled defendant's motion to dismiss on the ground that under an unbroken line of decisions of the Michigan Supreme Court, picketing of itself constituted threats and intimidations and is illegal. In reversing, the Supreme Court said (at 507) "But it could not be said that an employee's fear that the result of picketing would be the loss of his job is the result of fear and intimidation, within the meaning of those words as used in the statute; and it was *only on this single aspect of the case and on the assumption that any kind of picketing was illegal that the court convicted defendant.*" *"This is the only question before us on review."* The Supreme Court held that the *Thornhill, Carlson* (*supra*) and *Senn* v. *Tile Layers* (301 U. S. 468) cases had qualified its prior decisions. The case thus holds merely that peaceful picketing of the kind involved

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does not constitute the intimidation of an onlooker within the meaning of the statute.

In *Book Tower Garage* v. *Local No. 415*, 295 Mich. 580, however, the Michigan Supreme Court considered at length the effect of the *Thornhill, Carlson* and other decisions of the Supreme Court of the United States on its forty-two year old rule, first enunciated in *Beck* v. *Railway Teamsters Protective Union*, 118 Mich. 497, that all picketing was illegal. It held that "the dissemination of information about a labor dispute near the premises of an employer no longer has in its nature the 'covert and unspoken threats' which prompted the decision in the Beck case." Without overruling that case ("We think the Beck case is inconsistent only in part with these recent decisions"), it took occasion to define the permissible limits of picketing by approving an injunction issued during a strike by the lower court which permitted peaceful picketing by the maintenance of six pickets on each side of the plaintiff's premises and one in front of a hotel, which was not party to the suit. It took pains, however, to point out that

"The order appealed from by plaintiff provides that defendants may not interfere with plaintiff's employees or persons who desire to enter employ of plaintiff by use of threats, personal violence, intimidation or other means calculated or intended to prevent entering or continuing in the employment of plaintiff; defendants may not interfere with the access, ingress or egress of employees of plaintiff at or about any of the entrances of plaintiff's property or in any manner interfere with employees in their place of employment or at their homes or other places; *they may not interfere in any manner with persons desiring to do business with plaintiff; they may not congregate or loiter about the premises of plaintiff or in the vicinity thereof* or interfere with or obstruct plaintiff's business by coercion, threats or intimidation; *they are enjoined from inducing*

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or attempting to induce sellers of merchandise from refraining from selling plaintiff or from delivering merchandise to plaintiff and from endeavoring to prevent deliveries to plaintiff" (295 Mich. 582 italics supplied). Moreover, the court on granting the appeal, modified the injunction of the lower court by refusing to permit one picket to picket peacefully before an adjacent hotel and withdrew its modification only because the hotel was not party to the present suit (Cf. *People* v. *Bashaw, supra*).

It will be noted that the italicized limitations on picketing which the Michigan Supreme Court held warranted are almost exactly like those of the Alabama statute [2] which the Supreme Court of the United States struck down in the *Thornhill* case as an abridgement of free speech. In short, conduct which Alabama may not prohibit constitutes illegal picketing and therefore intimidation, criminally punishable, under the Michigan statute here challenged. Under the decisions in the *Bashaw* and *Book Tower Garage* cases, *supra*, it is clear that the decisions of the Michigan Supreme Court have not narrowed the scope of the possible meaning of the statute, to eliminate the danger that, on its face, and without regard to the particular facts in the case, it constitutes an abridgement of constitutionally protected rights. Cf. *Mahler* v. *Eby*, 264 U. S. 32, 40-41; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Fox* v. *Washington*, 236 U. S. 273.

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[2] "Any person, who, without just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation or association of people engaged in a lawful business for the purpose or with the intent of influencing or inducing other persons not to trade with, buy from sell to have business dealings with or be employed by such persons, firms, corporations or associations of persons or who picket the works or place of business of such other persons, firms, corporations or associations of persons for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another shall be guilty of a misdemeanor." 310 U. S. 91-92.

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2. As to the due process requirement of definiteness.

It is clear, we submit, that the statute, on its face, fails to meet the due process requirements of definiteness in statutes. The statute penalizes "any . . . persons who by threats, intimidations, or *otherwise* and without authority of law interfere with, or *in any way* molest or *attempt to interfere with* or in any way molest or disturb without such authority any mechanic or laborer in the quiet and peaceable pursuit of his *lawful avocation*" (italics supplied).

The terms "otherwise . . . interfere with or . . . in any way . . . to interfere with" are broad enough to prohibit permissible liberty of discussion and, in any event, are insufficiently definite, as a guide to adjudication or to future conduct, to take the statute out of the ban of *Lanzetta* v. *New Jersey*, 306 U. S. 451; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Connally* v. *General Construction Co.*, 269 U. S. 385, and related cases. See Note "Due Process Requirements of Definiteness" in Statutes 62 Harv. L. Rev. 77-87 (1948). It will be noted, further, in this connection that the statute lacks the element of culpable intent, which might tend to lessen the degree of definiteness required in a criminal statute. See *United States* v. *Ragen*, 314 U. S. 513; *Gorin* v. *United States*, 312 U. S. 19; *United States* v. *Alford*, 274 U. S. 264.

Similarly, the term "avocation" is insufficiently definite. It is defined in Webster's New International Dictionary, 2nd ed., as follows:

> "1. A calling away; a diversion *archaic.*
>
> 2. State of being called away; diversion of attention.
>
> 3. That which calls one away from one's regular employment or vocation; a subordinate occupation, esp. one pursued with enjoyment; a hobby.
>
> 4. Customary employment; vocation, usual pursuits;—a use now preferably avoided because it does

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away with the useful distinction between avocation and vocation."

Apparently, the ambiguity in this respect was recognized by the legislature itself, for by Act No. 297 of the Public Acts of 1947, effective October 11, 1947, it amended the statute to read as follows:

"Any person or persons who shall, by threats, intimidation or otherwise and without authority of law, interferes with or in any way molests or attempts to interfere with or in any way molests or disturbs, without such authority (any person) in the quiet and peaceable pursuit of his lawful (occupation, vocation or) avocation (or in the way to and from such occupation, vocation or avocation or who shall aid or abet in any such unlawful acts) shall be guilty of a misdemeanor (Compiled Laws, Michigan, 1948, Section 750.352, amendments in brackets).

The statute in its original version, as here in issue, was challenged as "unenforcible because of indefiniteness and because it violates the State and Federal Constitutions as to class legislation and as to civil rights granted by said Constitutions" *People* v. *Washburn*, 285 Mich. 119. In that case, defendant, leader of a strike, was convicted of aiding and abetting a group of strikers, not named or charged with crime, who, armed with clubs, told a non-striker seeking to pass the picket line "There will be no work here today . . . Do you want to go to work . . . sign on the dotted line." Defendant himself was not present. The Michigan Supreme Court affirmed the conviction, holding that the challenge was without merit. "The act is violative of no constitutional provision, State or Federal." That court refused to allow an appeal to the Supreme Court of the United States and defendant then petitioned the Supreme Court of the United States for the allowance of an appeal. The petition was referred by the Chief Justice to the Court and

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was, by the Court, denied. *Washburn* v. *People*, No. —, 305 U. S. 577. The appeal was thus never perfected and constitutes no precedent, decisive of this case.

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 1257 of Title 28 of the United States Code.

Respectfully submitted,

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APPENDIX "A"

IN THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN, STATE OF MICHIGAN

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs.

HAROLD ANDERSON,
Defendant.

Docket No. 6352

Opinon of the Court Denying Motion for New Trial

Filed February 8, 1949, Frank X. Duerr, Jr., Berrien County Clerk.

Respondent, Harold Anderson, was convicted of violating section 352 of the Michigan Penal Code, being Stats, Ann. 28.584, which reads as follows:

> "Any person or persons who shall by threats, intimidations or otherwise and without authority of law interfere with or in any way molest or attempt to interfere with or in any way molest or disturb without such authority, any mechanic or other laborer in the quiet and peaceable pursuit of his lawful avocation shall be guilty of a misdemeanor."

The case was tried by the Court without a jury, the respondent having expressly waived his rights to a jury trial. Three or four days were consumed in taking testimony of a great many witnesses on both sides of the case. At the conclusion of the arguments of counsel, the Court dictated his reasons for finding the respondent guilty, which opinion is incorporated herein by reference.

Respondent now moves the Court to grant him a new trial based on nine allegations of error, which will be considered in the same order as they were presented.

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The respondent contends that the verdict was against the overwhelming weight of the evidence. In his remarks at the conclusion of the trial the Court said:

> "Now I think the Court at this time should state that I am mindful of the presumption of innocence, the burden of the People to establish their case beyond a reasonable doubt, and the fact that this is being tried before the Court, the jury having been expressly waived, the Court is charged with the responsibility of weighing the testimony of the several witnesses, determining their credibility and in general performing all the functions of a court and jury as well in the decision of this case."

The Court then touched upon some of the witnesses and reviewed some of the highlights of the proofs. The Court pointed out the reasonableness and probability of the stories told by the People's witnesses as contrasted with that told by the defense witnesses; pointed out that the discrepancies in the stories told by the several witnesses for the People were not so great as to destroy their individual values but rather tended to strengthen the feeling that the witnesses were telling the truth, each in the light of his own recollection of it; and pointed out that the stories told by the defense witnesses were so much alike as to have created the suspicion as having been rehearsed.

The Court concluded by saying:

> "The conclusion of the Court after a consideration of all the factors involved, and the Court has diligently considered all the factors of the case, is that the People have established their case beyond all reasonable doubt and that the respondent, Harold Anderson, is guilty as charged."

Now, having had an opportunity to review the transcribed record of all the testimony taken, the Court is of the opinion that the verdict was amply justified and was not against the overwhelming weight of the evidence.

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Respondent here, for the first time, raised the question of the constitutionality of the act under which the Respondent was charged. This Court is of the opinion that there is no merit in this contention.

3

Respondent claims that the act in question is vague and indeterminate, and incapable of construction. With this contention the Court is unable to agree. The act is couched in plain unambiguous terms, and is vague only to defense counsel who attempts to read into it interpretations obviously not in contemplation of the legislature when the act was passed.

4

The respondent claims that the People failed to establish that the respondent "did refuse to allow" the complaining witness to carry on his lawful avocation. The gist of counsel's argument is that the dictionary definition of "avocation" is that of a part-time pursuit, such as a hobby, through which one seeks release or relief from the strain and fatigue of one's vocation; the latter being defined as the pursuit of a livelihood. To this Court the legislative intent as expressed in this act is so plain as to permit of no serious contention that the legislature meant "hobby" when they used the word "avocation;" particularly is this true when we find that Webster's New International Dictionary, second edition, indicates that "vocation" and "avocation" are commonly used synonymously.

5

The respondent claims that the People failed to establish that the respondent interferred with the complaining witness "as charged by the complaint and as necessitated by the statute." This presumably is another way of stating the contention raised under paragraph 4 and the Court's answer is the same as above. That the respondent "interfered" was established beyond a reasonable doubt.

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6

The respondent claims that the People failed to establish that the respondent molested the complaining witness "as charged in the complaint and as necessitated by the statute." This appears again to be a reiteration of the claims made in paragraphs 4 and 5, and the Court's answer is the same as in paragraph 4 above. That the respondent "molested" was established beyond a reasonable doubt.

7

The respondent claims that the People failed to establish that the respondent attempted to interfere with the complaining witness "as charged in the complaint and as necessitated by the statute." This appears to be still another repetition of the same allegations as contained in paragraphs 4, 5, and 6. The answer is the same.

8

The respondent claims that the People failed to establish that the complaining witness was a laborer as charged in the complaint and necessitated by the statute. The Court finds that the status of the complaining witness as an employee and laborer or mechanic was very clearly established by the testimony of the complaining witness himself and that of the personnel manager for complaining witness's employer.

9

Respondent claims that the People failed to establish that the complaining witness was in the quiet and peaceable pursuit of his lawful avocation as charged in the complaint and as necessitated by the statute. A review of the testimony taken at the trial evidences no grounds for respondent's contention whatever. There is no merit in this claim.

For the reasons assigned in the opinion dictated by the Court at the conclusion of the trial and for the reasons

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herein above stated the motion for new trial can be and the same hereby is denied.

Dated: April 19, 1948.

(S.) Edward A. Westin,
Circuit Judge,
Second Judicial Circuit.

APPENDIX "B"

In the Circuit Court for the County of Berrien, State of Michigan

Case No. 6352

People of the State of Michigan

vs.

Harold Anderson, Respondent

Filed Feb. 8, 1949. Frank X. Duerr, Jr., Berrien County Clerk.

Findings of the Court

I should like to say on the record before passing to a consideration of the matter in dispute that while there is no doubt that the occasion which gave rise to this prosecution was marked with considerable feeling, confusion, stress and so forth, nevertheless this case has been conducted in this court in an air of detached calm and almost complete objectivity, and in that light I should like to compliment counsel on both sides for their assistance to the court in this case. This case could have been tried as a dog fight or it could have proceeded as it has, on a high class plane calculated to arrive at a just and righteous verdict, from a consideration of the facts and the law applicable to it and I should like counsel to know my appreciation.

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Now, the respondent, Harold Anderson has been charged with violation of Section 352 of the Penal Code being M. S. A. 28.584 which reads as follows:

> "Any person or persons who shall by threats, intimidations or otherwise and without authority of law interfere with or in any way molest or attempt to interfere with or in any way molest or disturb without such authority, any mechanic or other laborer in the quiet and peaceful pursuit of his lawful avocation shall be guilty of a misdemeanor."

The essential elements of this offense which would be necessary for the prosecution to establish beyond a reasonable doubt in order to justify the court in finding this respondent guilty would be as follows:

First: That the complaining witness, Gruss, was at the time alleged in the complaint, a mechanic or other laborer in the quiet peaceful pursuit of his lawful avocation.

Second: That there was an interference with or a molestation of Mr. Gruss in the pursuit of his lawful avocation, or an attempt at the same.

Third: That such interference or molestation, or attempted interference or molestation was accomplished by threats, intimidation and otherwise.

Fourth: That such interference or molestation or attempt at the same was without authority of law, and

Fifth: That the respondent was a party to such interference or molestation.

And at this time because of a suggestion made during the course of argument I might point out counsel's argument that an attempted interference or molestation would not justify a conviction. It would be my judgment that no participation either such as claimed by the prosecution in this case or as was found by the court in the Washburn case would be necessary to justify a conviction. It is not seriously contended, and if it were I would find as a matter of fact that there was an interference or molestation with

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Mr. Gruss who at that time was a laborer or mechanic in the quiet and peaceable pursuit of his lawful avocation and that such interference or molestation was without authority of law. Further than that it was accomplished by threats, intimidation or otherwise. The principal question in this case in my mind is whether the respondent Anderson was a party to such interference or molestation. Now, we have heard testimony here for some three days and the court has listened very carefully to the excellent arguments of counsel and will have these observations to make.

On the occasion which gave rise to this prosecution as I have heretofore stated, considerable confusion existed, a large number of people were milling around and engaged in vociferous activity, feelings ran high, things happened fast. The events that took place were not rehearsed, nor were they anticipated. Perhaps they may have been, in their larger aspect, perhaps they were planned, perhaps the police had rehearsed their duties under similar conditions, but what I am getting at is that nobody knew from one second to the next what was going to happen at a particular place. If we might find a camera with fast lens or a movie camera that could record and indelibly retain each and every aspect of that picture we might then be able to recognize the number of people involved. So this court is not so much concerned with some discrepancies, inconsistencies and vagaries in the proofs. We are all conscious of the frailties of human memory, particularly ones memory of details of an occasion such as this. Had these events taken place leisurely, deliberately and quietly we might expect more of the witnesses in accuracy as to both time and place. A consideration of the questions in dispute in this case must be dependent upon a consideration of the salient things involved in this charge, not so much as to who ran in exactly what direction or if his hands at any given time were in any certain position, but the question is was Harold Anderson, the respondent, at the time and place charged by the people actually involved, in an interference or molestation of a mechanic or laborer in the peaceful pursuit of his lawful avocation. Now, I

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think the court at this time should state that I am mindful of the presumption of innocence, the burden of the People to establish their case beyond a reasonable doubt, and the fact that this was being tried before the court, the jury having been expressly waived, the court is charged with the responsibility of weighing the testimony of the several witnesses, determining their credibility and in general performing all the functions of a court and jury as well in the decision of this case. As I have so often charged juries in criminal cases it is their duty to hear the testimony of the witnesses, observe their demeanor on the stand while testifying, consider their bias or prejudice, if any, and whether such bias or prejudice might have any bearing on the testimony they are giving; their intelligence or lack of it, their frankness or want of it, the reasonable probability of the story that he or she tells you. All these things go into the determination of who has told the truth and who has not told the truth.

In my scrutiny of all the testimony that has been introduced in the trial of this case I am not unmindful of the fact that the principal and essential elements to be discovered by the court are the controlling things and if the presence of inconsistencies in the stories of the witnesses are not too great they may indeed tend to establish that such witnesses are telling the truth and that the inconsistencies or the vagaries are due to frailties of human memory, and on the other hand if the stories told by the witnesses on the witness stand are too 'pat', too much alike, it may create suspicion of being rehearsed.

From a consideration of all the factors in this case the court is of the opinion that the testimony of the complaining witness Gruss, which in its essentials was that he well knew the respondent Anderson and that on the occasion in question Anderson was at his car, did take part in bouncing or rocking his car, trying to tip it over and that previous to that by a moment or so, Anderson had told him to back out, meaning to back out of the driveway, the court cannot reject that story; the court cannot reject the story of the officer who made this arrest. The officer may be confused on some details but he couldn't be confused as to when and

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how he arrested the man, as to whether he arrested him at the car and in the commission of this misdemeanor or whether he took him from a couple of other officers. Those things are too important for witnesses to confuse.

There was no question in the mind of the complaining witness as to the identify of the respondent and fixing him in the group who were committing this interference or molestation there by the car, and Officer Biggs said that the respondent was in the commission of that misdemeanor at the time he arrested him, that he did not take him from some other officers who may have previously arrested him. The stories of these two men are corroborated, if indeed they need corroboration, by the story of Walter Newland which was very compelling. It was a good sound logical story. The story told by Newland was too probable to withstand attack, and the conclusion of the court after a consideration of all the factors involved and the court has diligently considered all the factors of the case, that the respondent—that the People have established their case beyond all reasonable doubt and that the respondent Harold Anderson is guilty as charged.

Mr. Killian: In view of the situation here we are about to proceed with another case following this one, the People move that the court impose sentence at this time on the respondent.

The Court: Any objection, counsel?

Mr. Feldman: No objection.

The Court: Mr. Anderson, come up here.

Respondent Before the Bar

The Court: Mr. Anderson, do you have anything to say at this time why sentence should not be passed?

Respondent Anderson: No.

The Court: The sentence of the court is you be imprisoned by the County Jail for the County of Berrien for a period of 60 days from and including today, the 16th, day of January 1948.

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IN THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN, STATE OF MICHIGAN

No. 6352

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

HAROLD ANDERSON,
Respondent-Appellant

REPLY TO APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellee's Statement as to Jurisdiction and Motion to Dismiss or Affirm is limited exclusively to the claim that the questions presented by appellant are of an unsubstantial nature. In support of its claim, it makes three points:

1. That the Circuit Court for the County of Berrien on all the evidence found appellant guilty as charged of trying to tip over the car of the complaining witness.

This fact is irrelevant to the question of whether appellant's attack on the statute involved raises substantial constitutional questions, without regard to the charge or the evidence under it. Appellant's claim, under *Thornhill* v. *Alabama*, 310 U. S. 97 and related cases which it has cited, is that the statute (Section 352 of the Michigan Penal Code) on its face is subject to specified constitutional infirmities. The finding of guilt on the evidence in the particular case does not eliminate these constitutional infirmities.

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2. That the statute involved has been sustained by the Supreme Court of Michigan against challenges that it is in violation of the federal constitution.

It should be noted preliminarily that appellee has quoted the statute as amended, and not the statute under which appellant was convicted and which he questions on this appeal. The difference in the original and the amended statute is of importance because the amendment shows the legislative recognition of the indefiniteness of the original statute in the respects which appellant has pointed out in his statement as to jurisdiction.

Appellee cites *People* v. *Washburn*, 285 Mich. 119, 123 ALR 311 (involving the original statute), in which the Supreme Court of the United States denied the petition for appeal 305 U. S. 577. As pointed out by appellant in his Statement as to Jurisdiction, only the *petition* for appeal was denied in that case. The appeal itself was never perfected, as an examination of the papers in this case on file in the Supreme Court of the United States demonstrates.

Appellee also cites *Cole et al.* v. *State*, 216 S. W. 2d 402, after mandate from the Supreme Court of the United States 333 U. S. 196, in which the Supreme Court of Arkansas upheld Section 1 of the Arkansas statute there involved against the challenge that it was indefinite and violative of state and federal constitutions.

But the Arkansas statute is different in critical respects from the Michigan statute here involved. The Arkansas statute provides in Section 1:

"It shall be unlawful for any person by the use of force or violence or threat of the use of force or violence to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. . . ." (Act 193, Acts of Arkansas 1943).

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The Michigan statute here involved provides:

"Any person who shall by threats, intimidation *or otherwise*, and without authority of law, *interfere with* or *in any way* molest or *attempt to interfere with, or in any way molest or disturb*, without such authority any mechanic or other laborer in the quiet and peaceable pursuit of his *avocation* shall be guilty" (Michigan Penal Code, Section 352, Act No. 328, Public Acts of 1931, italics supplied).

The italicized words in the Michigan statute, which do not appear in the Arkansas statute, are the basis of the questions presented in the case at bar. Obviously, a determination by the Supreme Court of Arkansas that the Arkansas statute is valid under the federal constitution is not determinative of the validity of the different Michigan statute. In any event, counsel is informed the decision of the Supreme Court of Arkansas in the *Cole* case on remand is now the subject of a further petition for certiorari to the Supreme Court of the United States.

For the same reason, it is immaterial that the Court of Criminal Appeals of Texas sustained the constitutionality of a Texas statute (Art. 1621b of Texas Penal Code, as amended by Ch. 100, Acts 47th Legislature, Regular Session, Vernon's P. C. Article 1621b), cited by the Supreme Court of Arkansas as identical with the Arkansas statute, with the exception of an emergency clause. The Texas and Arkansas statutes are critically different from the Michigan statute and a determination by the Texas and Arkansas Courts or even the dismissal of an appeal by the Supreme Court of the United States in a case involving the Texas statute for want of substantial Federal question (*Sanford* v. *Hill*, 316 U. S. 647), is not determinative in any way of the substantial nature of the questions presented in the case at bar.

3. That three recent decisions of the Supreme Court of the United States (*A. F. of L.* v. *American Sash & Door*

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Co., 335 U. S. 538; *Lincoln Federal Labor Union et al.* v. *Northwestern Iron & Metal Co.*, No. 47, October Term, 1948 (decided January 3, 1949); *Whitaker* v. *North Carolina*, 335 U. S. 525), show that no substantial federal question is here involved.

But those decisions involved a North Carolina statute and Nebraska and Arizona constitutional amendments which prohibited denial of opportunities in employment because of membership or non-membership in a labor organization and further prohibited agreements excluding persons from employment because of such membership or non-membership. The validity of such enactments and amendments is not even remotely involved in the case at bar.

It is respectfully submitted that the questions presented by the appeal in the case at bar are of a substantial nature, warranting a review by the Supreme Court of the United States of the decision of the Circuit Court for the County of Berrien, Michigan, which upheld the Michigan statute here involved against timely challenges as to its constitutionality under the Fourteenth Amendment to the Constitution of the United States, and that appellee's motion to dismiss or affirm should be denied.

ROBERT S. FELDMAN,
143 Pipestone Street,
Benton Harbor, Michigan;
ALLAN R. ROSENBERG,
932 Bowen Building,
Washington 5, D. C.,
Attorneys for Appellant.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 698

HAROLD ANDERSON,

Appellant,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

APPEAL FROM THE CIRCUIT COURT OF BERRIEN COUNTY, STATE OF MICHIGAN

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

STEPHEN J. ROTH,
Attorney General of Michigan;
EDMUND E. SHEPHERD,
Solicitor General of Michigan;
DANIEL J. O'HARA,
Assistant Attorney General of Michigan;
JOSEPH E. KILLIAN,
Prosecuting Attorney of Berrien County, Michigan,
Counsel for Appellee.

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Statutes Cited

Act 163 of the Legislature of Michigan, Public Acts 1867, Sec. 7690, Compiled Laws 1871, Vol. 2, as amended by Act 297, Public Acts of 1947, Sec. 750.353, Compiled Laws of Michigan 1948, Sec. 28.584, Mich. Stat. Ann. (Henderson) 1947 Cum. Supp. 3

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IN THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN, STATE OF MICHIGAN

No. 6352

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

HAROLD ANDERSON,
Respondent-Appellant

APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, insofar as a federal question is concerned, files this, its statement in opposition to appellant's statement as to jurisdiction. Appellee includes herein its motion to dismiss the appeal or in the alternative to affirm the judgment of the lower court on the ground that the questions raised on behalf of appellant are so unsubstantial insofar as a federal question is concerned as not to need further argument.

Appellee asserts that the unsubstantial character of the grounds stated by appellant is so apparent on the face of the record as to warrant the court in summarily disposing of the appeal at this stage of the proceeding.

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The matters here relied upon by appellee and more particularly stated below are:

The trial court stated (Page 4 of the Findings of the Court):

> "From a consideration of all the factors in this case the court is of the opinion that the testimony of the complaining witness Gruss, which in its essentials was that he well knew the respondent Anderson and that on the occasion in question Anderson was at his car, trying to tip it over and that previous to that by a moment or so, Anderson had told him to back out, meaning to back out of the driveway, the court cannot reject that story; the court cannot reject the story of the officer who made this arrest. The officer may be confused on some details but he couldn't be confused as to when and how he arrested the man, as to whether he arrested him at the car and in the commission of this misdemeanor or whether he took him from a couple of other officers. Those things are too important for witnesses to confuse.
>
> "There was no question in the mind of the complaining witness as to the identity of the respondent and fixing him in the group who were committing this interference or molestation there by the car, and Officer Biggs said that the respondent was in the commission of that misdemeanor at the time he arrested him, that he did not take him from some other officers who may have previously arrested him. The stories of these two men are corroborated, if indeed they need corroboration, by the story of Walter Newland which was very compelling. It was a good sound logical story. The story told by Newland was too probable to withstand attack, and the conclusion of the court after a consideration of all the facts involved and the court has diligently considered all the factors of the case, that the respondent—that the People have established their case beyond all reasonable doubt and that the respondent Harold Anderson is guilty as charged."

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The Michigan statute here challenged was first enacted by the Legislature of Michigan by Act 163, Public Acts 1867, Sec. 7690 Compiled Laws 1871, Vol. 2.

This section of the statute as amended by Act 297, Public Acts 1947, Sec. 750.353, Compiled Laws of Michigan 1948, Sec. 28.584, Mich. Stat. Ann. (Henderson) 1947 Cum. Supp., reads as follows:

> "Any person or persons who shall, by threats, intimidations, or otherwise, and without authority of law, interfere with, or in any way molest, or attempt to interfere with, or in any way molest or disturb, without such authority, any person, in the quiet and peaceable pursuit of his lawful occupation, vocation or avocation, or on the way to and from such occupation, vocation or avocation, or who shall aid or abet in any such unlawful acts, shall be guilty of a misdemeanor."

The Supreme Court of Michigan has sustained this statute as being enforceable, and not unenforceable because of indefiniteness, and a proper exercice of the police power of the State, and that the statute is not violative of any constitutional provision, State or Federal. See

> *People* v. *Washburn*, 285 Mich. 119, 123 A. L. R. 311, Petition for appeal, referred by the Chief Justice to the Court, denied *Washburn* v. *Michigan*, 305 U. S. 577.

In the case of *Cole, et al.* v. *State,* (Supreme Court of Arkansas, January 1949) 216 S. W. (2d) 402, after mandate from the United States Supreme Court in the case of *Cole* v. *Arkansas*, 333 U. S. 196, the Court said on page 403:

> "In assailing the constitutionality of said Act 193, appellants say that the act is too indefinite to charge an offense, and also that the act violates provisions of

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both the State and the Federal Constitutions and Amendments. Section 1 of Act 193 has been upheld by this Court in several cases. See *Smith and Brown v. State*, 207 Ark. 104, 179 S. W. (2d) 185, 188, and *Gurein v. State*, 209 Ark. 1082, 193 S. W. (2d) 997. In *Smith and Brown v. State* (207 Ark. 104, 179 S. W. (2d) 186) we said:

"'• • • The Act here in question is an exact or verbatim copy of the Texas Statute, Art. 1621b of Texas Penal Code as amended by Chapter 100, Acts 47th Legislature, Regular Session, Vernon's P. C. Art. 1621b, except the latter statute carries an emergency clause, whereas, ours does not. On December 10, 1941, the Court of Criminal Appeals of Texas sustained the constitutionality of the Texas statute in *Ex parte Frye*, 143 Tex. Cr. R. 9, 156 S. W. (2d) 531. On the same date the same Texas Court sustained the same statute in *Ex parte Sanford*, 144 Tex. Cr. R. 430, 157 S. W. (2d) 899, on the authority of the *Frye* case. The Sanford case was appealed to the United States Supreme Court where it was dismissed on the ground that it did not involve a federal question. *Sanford v. Hill*, 316 U. S. 647.'"

And in view of other recent decisions of the Supreme Court of the United States in *American Federation of Labor* v. *American Sash & Door Co.*, 335 U. S. 538; *Lincoln Federal Labor Union, et al.*, v. *Northwestern Iron & Metal Co.*, No. 47, October Term 1948 (decided January 3, 1949) together with *Whitaker, et al.*, v. *North Carolina*, 335 U. S. 525, no substantial federal question is here involved.

WHEREFORE, appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument and appellee respectfully moves the Court to

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dismiss this appeal, or in the alternative to affirm the conviction of appellant entered below.

Respectfully submitted,

STEPHEN J. ROTH,
Attorney General;
EDMUND E. SHEPHERD,
Solicitor General of Michigan;
DANIEL J. O'HARA,
Assistant Attorney General of Michigan;
JOSEPH E. KILLIAN,
Prosecuting Attorney of Berrien County,
For Appellee.

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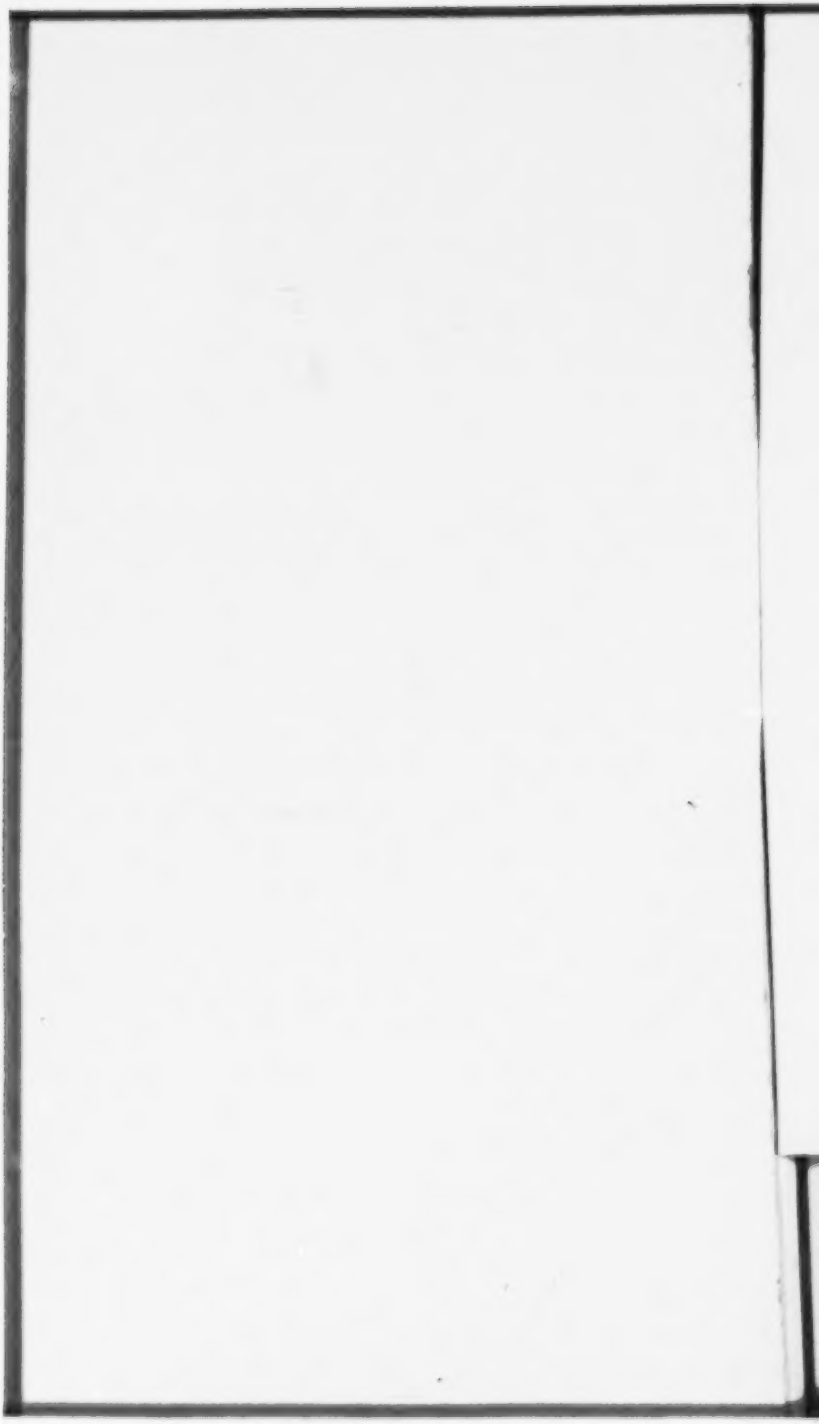

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No. 698. ANDERSON *v.* MICHIGAN. Appeal from the Circuit Court of Berrien County, Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Allan R. Rosenberg* for appellant. *Stephen J. Roth*, Attorney

General of Michigan, *Edmund E. Shepherd*, Solicitor General, and *Daniel J. O'Hara*, Assistant Attorney General, for appellee.

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